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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-1249

STATE OF LOUISIANA,
Petitioner,

V.

JAMES E. DIVERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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QUESTION PRESENTED

I.

Whether the judgment of the Louisiana Supreme Court reversing Respondent's conviction for first degree murder rests on adequate and independent state grounds, thus presenting no federal constitutional issue which this Court has jurisdiction to entertain.

IN THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The Respondent, James E. Divers, prays that this Court deny the *Petition for a Writ of Certiorari* in this case.

CITATION TO OPINIONS BELOW

The judgment of the Louisiana Supreme Court is cited and reported as follows: State of Louisiana v. James E. Divers, 94-0756, 681 So.2d 320 (La. 1996) (reh. denied October 11, 1996).

JURISDICTION

For the reasons stated below, Respondent maintains that this Court has no jurisdiction to review the judgment of the Louisiana Supreme Court in this case, as the lower court's decision rests on an adequate and independent state ground.

STATEMENT OF THE CASE

Respondent relies on, and incorporates herein by reference, the statement of facts set forth in the opinion of the Louisiana Supreme Court in this case.

REASONS FOR NOT GRANTING THE WRIT

I. **The judgment of the Louisiana Supreme Court reversing Respondent's conviction for first degree murder rests on adequate and independent state grounds, thus presenting no federal constitutional issue which this Court has jurisdiction to entertain.**

The judgment of the Louisiana Supreme Court in this case is grounded not partly, but exclusively, on the Louisiana Constitution. As such, this Court is without jurisdiction to disturb the judgment of the Louisiana Supreme court. The petition for a writ of certiorari must therefore be denied.

The rationale for the Court's inability to review a state court judgment such as the one at issue here,

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); *see also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Ridgway v. Ridgway, 454 U.S. 46, 54 (1981); Michigan v. Long, 463 U.S. 1032 (1983); Oregon v. Kennedy, 456 U.S. 667, 671 (1982).

In this case, the Louisiana Supreme Court found that the trial court erroneously denied two challenges for cause urged by Respondent during the selection of the jury. Neither of these venirepersons served on the jury, as Respondent utilized two of his peremptory challenges to remove them.

Respondent's conviction was reversed because, *as a matter of state law,* he was denied his right to the full exercise of his complement of peremptory challenges:

> **Our jurisprudence** states that prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges. An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error.

State v. Divers, 681 So. 2d 320, 323 (La. 1996) (collecting cases).

It is somewhat difficult to discern the precise issue or issues presented by the State's *Petition for Writ of Certiorari.*[1] However, it would appear that Petitioner's chief complaint is that Respondent's federal constitutional rights were not violated by the trial court's erroneous rulings inasmuch as neither venireperson

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[1] **At one point Petitioner defines the issue as follows: "This is the issue, what happens when your perempts [sic] are exhausted not just that they are exhausted." (*Petition for Writ of Certiorari, at 14*) (hereinafter "Petition").**

actually sat in judgment. See Ross v. Oklahoma, 487 U.S. 81 (1988). However, the lower court's opinion does not purport to adjudicate Respondent's rights under the federal constitution. Rather, it vindicates Respondent's rights under the state constitution, which, in this instance, extend greater rights than obtain under federal constitutional law.

What Petitioner consistently overlooks is the fact that, unlike the federal constitution, the Louisiana Constitution expressly provides a criminal defendant with an absolute right to the exercise of peremptory challenges. Specifically, Article 1, § 17 of the Louisiana Constitution provides that "[t]he accused shall have the right to full voir dire *and to challenge jurors peremptorily.*"[2]

This Court is without jurisdiction to review the lower court's judgment, which rests exclusively on state law and does not purport to adjudicate Respondent's federal constitutional rights.

One additional point should be addressed. Petitioner contends, almost in passing, that the trial court's rulings on Respondent's cause challenges were not in error in the first instance. As Petitioner puts it, neither of the two challenges at issue "were valid challenges for cause under Wainwright v. Witt, 469 U.S. 412 (1985)." *Petition, at 15.*

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[2] **Art. 799 of the Louisiana Rules of Criminal Procedure allocates twelve peremptory challenges to the defense and the prosecution in capital cases.**

However, the Louisiana Supreme Court clearly applied the correct "substantial impairment" standard. Venireperson Pritchard should not have survived a cause challenge, as he believed in capital punishment for all murders, including second degree murders. "Pritchard's stubborn refusal to 'guarantee' or commit to his ability to follow the law provided a solid basis for a cause challenge." Divers, 681 So. 2d at 325. Further, his law enforcement ties (he was a revenue officer for the IRS) "exacerbated the problem." Id., 681 So. 2d at 326, n.7.

Juror Honea should also have been excused as she consistently stated that she would vote to execute all convicted murderers. "Mrs. Honea kept raising the issue of self-defense, which she seemed to believe was the only thing which could 'mitigate' a murder. She appeared utterly unable to comprehend the distinction between a defense in the guilt phase and a mitigating factor in the penalty phase." Id., 681 So. 2d at 326. "No individual rehabilitation was attempted by the prosecutor, nor did Mrs. Honea specifically abandon [her view that any case of intentional murder demands the death penalty]. She merely made a single general affirmation of her ability to follow the law when asked to do so en masse with her fellow panel members." Id., 681 So. 2d at 327.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

R. Neal Walker
636 Baronne Street, Third Floor
New Orleans, LA 70113
(504) 558-9867

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this pleading upon counsel opposite, Assistant District Attorney Madeleine M. Slaughter, Fourth Judicial District, P.O. Box 1652, Monroe, La. 71210, this 12th day of March, 1997.

LAW OFFICES
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867 Fax: (504) 558-0378

12th March, 1997

Clerk, United States Supreme Court
One First Street N.E.
Washington, D.C. 20543

Re: State of Louisiana v. James Divers

Dear Sir/Madam:

Please find enclosed the original and ten copies of both Mr. Divers' Opposition to the State's Petition for a Writ of Certiorari to the Supreme Court of Louisiana and his Motion for Permission to Proceed In Forma Pauperis. The State petitioned for review of the reversal of Mr. Divers' conviction in his capital prosecution.

I am filing this pleading for Neal Walker, who is Mr. Divers' attorney of record. Unfortunately, 36 hours ago Mr. Walker was struck by a car while on his bicycle, and has been very seriously injured. He is in the intensive care unit. I hope that this is in order, but if I have made a mistake, please call (and blame!) me rather than Mr. Walker.

I remain,

Yours sincerely,

Clive A. Stafford Smith

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